**SO ORDERED.**

**SIGNED this 16 day of February, 2005.**

**ROBERT E. NUGENT**
**UNITED STATES CHIEF BANKRUPTCY JUDGE**

---

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE DISTRICT OF KANSAS**

| | | |
|---|---|---|
| **IN RE:** | ) | |
| | ) | |
| **GOLD IN GRAIN, INC.,** | ) | **Case No. 04-10202** |
| | ) | **Chapter 11** |
| | ) | |
| **Debtor.** | ) | |
| | ) | |
| **GOLD IN GRAIN, INC.,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **v.** | ) | **Adversary No. 04-5100** |
| | ) | |
| **MARK A. FAULKNER, d/b/a FAULKNER REAL ESTATE** | ) | |
| | ) | |
| **Defendant.** | ) | |

## MEMORANDUM OPINION

In this adversary proceeding, plaintiff Gold in Grain, Inc.(GG) seeks the turnover of certain

proceeds of its property in the hands of Mark Faulkner, d/b/a Faulkner Real Estate, a sole proprietorship (Faulkner). After the trial of this matter on January 18, 2005, and after receipt of trial memoranda from GG and Faulkner, the Court is now ready to rule.

Jurisdiction

A proceeding for an order to turnover property of the estate is a core proceeding under 28 U.S.C. § 157(b)(2)(E). This Court has jurisdiction.

Findings of Fact

GG appeared through its current president, Glenn Gottlob. Mr. Gottlob is married to Charlotte Wilkey Gottlob, who owns 6.25 shares of stock in GG, a farming corporation. Ms. Gottlob's brother and sister-in-law, Darren and Gerri Wilkey, own 11.25 shares of stock in GG. Currently held in treasury are 1.25 shares of stock redeemed from a Misty Brown. GG holds what remains of the assets of the Wilkey family farming interests. Mr. Wilkey and Ms. Gottlob have significant disagreements about the manner in which the corporation's business should be conducted.

The Gottlobs live in Girard, located in the southeast corner of Kansas, some 400 miles from Ulysses.

GG, formerly known as Limper Farms, Inc., was incorporated in 1968 and, in 1979, changed its name to Gold In Grain Farms, Inc. Under the bylaws of GG, there are to be no fewer than three directors. During the relevant time periods here, there were but two directors, Darren and Gerri Wilkey. According to the Articles of Incorporation, the Board of Directors of GG may only authorize the sale of all or substantially all of the assets of the corporation upon a vote of two-thirds of the stock held at an appropriately noticed meeting. According to the bylaws of the corporation, a special meeting of the stockholders may only be convened on written notice given not less than 10 and not more than thirty days

prior to the scheduled meeting, either personally delivered or mailed to each shareholder of record

In the summer of 2002, Mr. Wilkey, then president of GG, determined that the failing condition of GG mandated a partial liquidation of its land and minerals in order to reduce GG's debt to Federal Land Bank and buy out Ms. Gottlob's interest. Ms. Gottlob met with Mr. Wilkey and his attorney to discuss liquidation but apparently no agreement was reached between Wilkey and Gottlob regarding the liquidation of the company.[1] Mr. Wilkey listed a portion of the real estate and minerals for sale by private auction with Mr. Faulkner. The sale did not bring sufficient money to buy out Ms. Gottlob and pay off the debt.

In the autumn of 2002, Mr. Wilkey contemplated another auction, this one to be scheduled in November, and to involve all or substantially all of GG's property. This public auction was to be conducted by Faulkner in Ulysses and was set for November 4. Ms. Gottlob had no knowledge of the sale until reading about it in the Ulysses paper in late October. Upon learning of this second sale, she contacted attorney Mike Kimball who wrote to Faulkner and Wilkey on October 31, 2002 warning them that Wilkey had failed to follow the necessary corporate law procedure to secure stockholder approval of a sale of substantially all of the assets.[2]

Notwithstanding receipt of this letter, after consultation with Wilkey and his counsel, Gary Hathaway, Faulkner went forward with the sale. When he called the sale of the real estate, he announced that the sale of real estate was subject to corporate approval and obtaining the necessary corporate authority to close. On that basis, he received and held the high bids on the tracts of land and oil and gas

---

[1] There are no minutes of this meeting.

[2] Pursuant to a special meeting called on November 1, 2002, the Wilkeys, claiming to represent the "majority of the board members and stockholders," voted to sell all the assets of GG. *See* Plaintiff's Ex. 20. Ms. Gottlob received no notice of this November 1 meeting.

interests offered. For reasons Faulkner could not explain, he did not sell the personalty on the same "subject to" basis. He did accept the high bid of Wilkey on three items of which Wilkey took possession, but for which he did not pay. The total price of these items was $6,950. All of the personal property was sold for a total of $18,100. The sum of $7,500 was paid to an unidentified lienholder on some of the equipment sold and the sum of $3,650 was held in escrow by Faulkner.

After the November 4 auction, Wilkey gave notice of a November 26, 2002 shareholders meeting for the purpose of ratifying the sale. Written notice was mailed to Ms. Gottlob in care of attorney Kimball on November 8, 2002. Ms. Gottlob did not participate in the November 26 meeting at which time the other shareholders (Mr. and Mrs. Wilkey) voted to ratify the sale and to dissolve the corporation.

Prior to this meeting, Ms. Gottlob commenced a shareholder action in Grant County, Kansas, District Court requesting an accounting of the corporation, asserting numerous occasions of fiduciary misconduct and actions against the corporate interest by the Wilkeys and seeking to quiet title in GG in the assets sold at the November 4 auction.[3] In 2003, the Wilkeys filed a bankruptcy petition in this Division seeking to reorganize their affairs under Chapter 12.[4] The Wilkeys' case has subsequently been dismissed.[5] In January of 2004, GG filed its bankruptcy petition in Chapter 11.

As a result of the legal turmoil surrounding the ownership and management of GG and the pendency of the lawsuit, Faulkner was never able to close any of the real estate or oil and gas sales. The real estate

---

[3] A notice of lis pendens was also filed in Stevens County, Kansas.

[4] Case No. 03-10938.

[5] The Willkeys voluntarily dismissed their case on March 30, 2004 pursuant to 11 U.S.C. § 1208(b).

and minerals contracts were cancelled and the earnest money deposits were returned to the prospective buyers.[6] Faulkner apparently did close all of the personal property sales and collected from all of the buyers except Wilkey. Wilkey owes GG some $6,950 in connection with the equipment on which he bid but for which he failed to pay. In all, the November 4 sale of personalty and real estate resulted in high bids and/or receipts of $367,900 on which Faulkner claims a four percent commission, or $14,716.[7] Pursuant to a release he received from Wilkey in June of 2003, Faulkner paid himself some $3,650 out of the escrow from the GG personalty sold in respect of this commission.

At the time of the November ratification meeting, the Wilkeys clearly did not control two-thirds of the outstanding shares of GG. Between them, they held 11.25 shares and Charlotte held 6.25. Thus, the Wilkeys constituted about 64 percent of the shares outstanding, just short of the 66.667 percent necessary to authorize a sale of substantially all of the assets according to the articles of incorporation.

Purporting to represent the corporation and acting as president, Wilkey executed a Personal Property Auction Contract with Faulkner.[8] It contained covenants that the seller had the authority to sell the property offered at auction and that the seller would hold Faulkner harmless against any adverse claim to title. Wilkey also signed an exclusive listing agreement with Faulkner pertaining to the real estate.[9] Under the listing agreement, seller makes no warranty or covenant with regard to ownership or authority

---

[6] Plaintiff's Ex. 14, 15, 16, 17, and 18.

[7] Plaintiff's Ex. 19. There is no suggestion that defendant ever received anything more than earnest money payments from the successful bidders on the real estate. *See* Defendant's Ex. C and D.

[8] Plaintiff's Ex. 12.

[9] Defendant's Ex. F.

other than to warrant that it will disclose any known material defects in the property. The agreement also provides that Faulkner will receive a 4 percent commission –

> . . . if the BROKER produces a ready, willing, and able Buyer for the property at the price and subject to the terms stated, or later agreed upon, or if the sale . . . of the property is made by the SELLER . . . during the term of this exclusive right to sell agreement.[10]

The agreement also provides that Faulkner would receive his commission if the property were sold within a 90 day protective period after the expiration of the listing agreement under certain conditions. Faulkner argues here that he produced ready, willing and able buyers, but that the intervening legal problems surrounding the management of the corporation defeated his ability to close. [It appears from GG's bankruptcy schedules that no one ever purchased any of the real estate.]

The only property arguably property of the bankruptcy estate in Faulkner's possession is the $3,650 proceeds of the sold equipment. The earnest money deposited on the sale of real estate and minerals was returned to the buyers when the sales did not close. And of the $11,150 of proceeds from the sale of personal property, $7,500 was given to a lienholder on one of the pieces of equipment.

Analysis

The only property remaining in Faulkner's possession is the $3,650 – this is likely all the estate can recover at this time. While the estate may have a cause of action against Faulkner with respect to Wilkey purchasing, but not paying for, three implements, there is nothing for the defendant to turnover, per se. Nothing in this ruling forecloses any effort the estate may undertake to recover from Faulkner or Wilkey in connection with that matter.

---

[10] Defendant's Ex. F, ¶ 9.

The turnover issue turns on the question of whether Wilkey was acting within the scope of his authority to authorize a sale of the corporation's assets. An agent's actions that are beyond the scope of his authority are not binding upon the principal.[11] It is undisputed that Ms. Gottlob received no notice of the November 1, 2002 stockholders meeting at which the Wilkeys purported to authorize the liquidation of GG. Nor did the Wilkeys hold two-thirds of the stock ownership required to approve the sale of all the assets of GG. These defects are fatal to the purported authorization given to Wilkey; Wilkey did not have actual authority to liquidate GG.[12]

Generally, Faulkner was entitled to rely on Wilkey's apparent authority and likely was not charged with a legal duty to inquire as to Wilkey's authority, at least until given reason to do so. In *Anheuser-Busch, Inc. v. Grovier-Starr Produce Co.*[13] this principle of agency law was discussed:

> If the third party [Faulkner] knows, or has good reason for believing, that the acts exceed the agent's [Wilkey's] powers, or if such reasonable inquiry as he is under the duty to make would result in a discovery of the true state of the powers, and he fails to fulfill that duty, he cannot assert an apparent authority effective against the principal. [citations omitted].[14]

---

[11] *Schmidt v. Farm Credit Services*, 977 F.2d 511, 515 (10th Cir. 1992), citing *Osborn v. Grego*, 226 Kan. 212, 596 P.2d 1233 (1979).

[12] *See Schmidt v. Farm Credit Services, supra*.(Mortgage transaction entered into by president of family farm corporation was unauthorized and beyond the president's authority where one director was not given notice of the special meeting authorizing the mortgage transaction.)

[13] 128 F.2d 146 (10th Cir. 1942).

[14] *Id.* at 152. *See also, Schmidt v. Farm Credit Services, supra* at 516 (Lender had duty to inquire further of president's authority where lender knew the loan proceeds would inure to the personal benefit of the corporate president); *Branding Iron Motel, Inc. v. Sandlian Equity, Inc. (In re Branding Iron Motel, Inc.)*, 798 F.2d 396 (10th Cir. 1986) (Mortgagee could not rely on apparent authority of debtor corporation's president where president used corporate property to secure a personal note and mortgagee never discussed transaction with any other officer, director or

And as stated in *In re Branding Iron Motel, Inc.*[15]:

> "Apparent authority and its effect vanish . . . in the presence of the actual knowledge of the third party as to the real scope of the agent's authority, or when the former has knowledge of facts which would put him upon inquiry as to the actual warrant of the agent." [citations omitted][16]

The October 31, 2002 letter from Ms. Gottlob's attorney gave notice to Faulkner and called into question Wilkey's authority to liquidate GG. Faulkner reasonably responded to that letter by crying the sale of real estate and minerals with the condition that any closing would be contingent upon the corporate officers securing the requisite legal authority to convey. But Faulkner did not make the sale of personalty subject to the same contingency. The Court therefore concludes that the sale of GG personalty was unauthorized and the sale proceeds in Faulkner's possession should be turned over to the estate.

With regard to his counterclaim, Faulkner appears to have produced buyers, but there is no evidence in the record that they were ready, willing and able. It was Faulkner's burden to show this.[17] Indeed, the evidence before the Court indicates that these buyers bid on the real estate and signed contracts to purchase, but nothing more.[18] In the end, the contracts were cancelled by mutual agreement of Wilkey

---

shareholder).

[15] *Branding Iron Motel, Inc. v. Sandlian Equity, Inc. (In re Branding Iron Motel, Inc.)*, 798 F.2d 396 (10th Cir. 1986).

[16] *Id.* at 401.

[17] *First Land Brokerage Corp. v. Northern*, 220 Kan. 48, 50, 551 P.2d 866 (1976); *Winkelman v. Allen*, 214 Kan. 22, syl. ¶ 2, 519 P.2d 1377 (1974); *Hand Realty Co. v. Meyers*, 234 Kan. 304, 307, 672 P.2d 583 (1983).

[18] *See Winkelman, supra* at 30 (An "able" buyer means more than mere mental competence to make a contract or physical ability to sign it; "able" refers to the financial ability of the purchaser.).

and the buyers and the buyers' earnest money was refunded after Ms. Gottlob filed her lawsuit against Wilkey. Moreover, it appears that the real estate described in the exclusive listing agreement has never been sold and, as such, the protective provisions of the listing agreement no longer apply.

No such considerations apply to the sale of the personalty to which Faulkner attached no limiting conditions notwithstanding being on clear notice that Wilkey was not legally authorized to sell the GG personalty. The $3,650 are proceeds of this equipment. Faulkner is a sole proprietor so the fact that he "took" his fee after Wilkey "released" him to do so does not change the character of the fund in his possession. Faulkner made no assertion that the funds were commingled, nor could he as he has continued to refer to them as escrowed, inconsistent with such a position. Therefore, judgment should be entered against defendant Faulkner ordering him to TURNOVER $3,650 to the estate.

A Judgment on Decision will issue this day.

IT IS SO ORDERED.

# # #